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Citation for published version (APA):

Eliantonio, M. (2019). The relationship between EU secondary rules and the principles of effectiveness and effective judicial protection in environmental matters: towards a new dawn for the 'language of rights'? *Review of European Administrative Law*, 12(2), 95-116.
<https://doi.org/10.7590/187479819X15840066091349>

Document status and date:

Published: 01/01/2019

DOI:

[10.7590/187479819X15840066091349](https://doi.org/10.7590/187479819X15840066091349)

Document Version:

Publisher's PDF, also known as Version of record

Document license:

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The relationship between EU secondary rules and the principles of effectiveness and effective judicial protection in environmental matters: towards a new dawn for the 'language of rights'?

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Abstract

Environmental policy is an area which has been quite heavily proceduralised and is a rather peculiar example of 'multi-level proceduralisation' because of the presence of the Aarhus Convention. This paper explores the relevant procedural provisions taken in the field of environmental law and in particular in implementation of the Aarhus Convention, and examines the case law which has involved these provisions. This case law is specifically discussed as concerns the way in which the Court of Justice deals with the interaction between the relevant secondary rules and the general principles of effectiveness and effective judicial protection, as well as Article 47 of the Charter of Fundamental Rights concerning the right to an effective remedy. It is shown that it is difficult to distill a consistent approach on the part of the Court with regards to this interaction, and that much depends on the specifics of the case and the question posed by the referring court. However, with the latest case law, despite the apparent lack of underlying rights which would be able to trigger the applicability of the Charter of Fundamental Rights, the Court of Justice seems to be moving towards a heavier involvement of Article 47 of the Charter and, consequently, of a 'language of rights', which increasingly plays a pivotal role in boosting the effectiveness of the Aarhus Convention.

1. Introduction

The Aarhus Convention¹ is a UN Convention which was developed within the UNECE (United Nations Economic Commission for Europe) and is structured around three main pillars: access to information, public participation, and access to justice in environmental matters aimed at promoting environmental democracy. The Convention was adopted by the European

* DOI 10.7590/187479819X15840066091349 1874-7981 2019 Review of European Administrative Law

¹ United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf accessed 12 October 2019. The EU and all EU Member States are contracting parties to the Convention.

Community on 17 February 2005 by Decision 2005/370/EC² and is, therefore, binding upon the EU as such, as well as the Member States when they act within the scope of application of EU law.³

The access to justice pillar, which is of interest for the purposes of this paper, is contained in Article 9 of the Convention. Article 9, in turn, contains access to justice provisions linked to the access to environmental information and to public participation, and a catch-all provision for any act or omission taken in violation of environmental law. Interesting for the purposes of this paper are especially Article 9(2) and (3) of the Convention, because they have given rise to much litigation where the relationship between secondary rules of procedural nature and the principles of effectiveness and effective judicial protection can be explored.⁴

This paper will explore the relevant procedural provisions taken in the field of environmental law and in particular as implementation of the Aarhus Convention, and will examine the case law which has involved these provisions. This case law will be specifically discussed as concerns the way in which the Court of Justice deals with the interaction between the relevant secondary rules and the general principles of effectiveness and effective judicial protection, as well as Article 47 of the Charter of Fundamental Rights concerning the right to an effective remedy. The environmental policy area is interesting with respect to this interaction, because several of the applicable procedural provisions only set minimum requirements, which leave room for manouver for the Member States, thereby not fully pre-empting the field and leaving some space for national procedural autonomy. The environmental policy field can be thus be re-

² Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L124/1.

³ It should also be added that, since all the Member States have ratified the Aarhus Convention, this international instrument is binding on them outside the scope of application EU law as well. However, in such cases, the effect of the Convention within the legal order of the Member States is dependent upon their constitutional orders.

⁴ The literature on the Aarhus Convention and its access to justice pillar in relation to the EU legal system is vast. See e.g. M. Pallemmaerts (ed), *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law* (Groningen, Europa Law Publishing 2011); P. Oliver, 'Access to Information and to Justice in EU Environmental Law: the Aarhus Convention' [2013] *Fordham Journal of International Law* 1423; J. Maurici, 'The Influence of the Aarhus Convention on EU Environmental Law: Part I' [2013] *Journal of Planning and Environmental Law* 1469, and J. Maurici, 'The Influence of the Aarhus Convention on EU Environmental Law: Part II' [2014] *Journal of Planning and Environmental Law* 181; M. Hedemann-Robinson, 'EU implementation of the Aarhus convention's third pillar: Back to the future over access to environmental justice?-Part 1' [2014] *European Energy and Environmental Law Review* 102, and M. Hedemann-Robinson, 'EU implementation of the Aarhus convention's third pillar: Back to the future over access to environmental justice?-Part 2' [2014] *European Energy and Environmental Law Review* 151.

garded as a ‘test case’ for the relevance and applicability of the principle of national procedural autonomy “in the presence of EU rules” (to dub the famous *Rewe* adagio).⁵ Furthermore, in the environmental policy field, several of the provisions adopted in this field are not meant to confer rights, but only to protect the general interest, rendering it a virtually unique ‘playground’ for distilling the possible differences between the seemingly more ‘objective’ principle of effectiveness, on the one hand, and the right-based principle of effective judicial protection and Article 47 of the Charter, on the other hand.⁶

It will be shown that it is difficult to distill a consistent approach on the part of the Court with regards to this interaction, and that much depends on the specifics of the case and the question posed by the referring court. However, with the latest case law, despite the lack of underlying rights which would be able to trigger the applicability of the Charter of Fundamental Rights, the Court of Justice seems to be moving towards a heavier involvement of Article 47 of the Charter and, consequently, of a ‘language of rights’, which increasingly plays a pivotal role in boosting the effectiveness of the Aarhus Convention. This development, while positive in terms of ensuring an effective protection of EU environmental law, is not fully in line with the wording of the Charter and brings about a certain risk of conceptual confusion as to applicability of the Charter and the remaining role for the case law based principles of effectiveness and effective judicial protection.

2. The Aarhus Convention and its (non-)transposition by the European Union

As mentioned in the introduction, the main ‘driver’ of the proceduralisation of environmental law at the EU level has been the Aarhus Convention and in particular its access to justice provisions contained in Article 9(2) and (3).

⁵ In the *Rewe* case, the Court presented the principles of equivalence and effectiveness as limits to the national procedural autonomy of the Member States, ‘[I]n the absence of Community rules on this subject’. Case C-33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* EU:C:1976:188. On the principle of national procedural autonomy, see M. Bobek, ‘Why is there no principle of “procedural autonomy” of the Member States?’ in H. W. Micklitz and B. de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Antwerp, Intersentia 2012) 305-324.

⁶ See on the distinction between these notions, S. Prechal and R. Widdershoven, ‘Redefining the relationship between “*Rewe*-effectiveness” and effective judicial protection’ [2011] *Review of European Administrative Law* 31; J. Krommendijk, ‘Is there light on the horizon? The distinction between “*Rewe* effectiveness” and the principle of effective judicial protection in Article 47 of the Charter after *Orizzonte*’ [2016] *Common Market Law Review* 1395.

Article 9(2) mandates certain requirements for access to justice with respect to situations where the second pillar of the Convention (public participation) is at stake. This article provides that the contracting parties should ensure that concerned members of the public with (1) a sufficient interest; or (2) maintaining impairment of a right (where the administrative procedural law of a state requires this as a precondition), have access to a review procedure to challenge the substantive and procedural legality of decisions concerning activities, subject to the public participation requirements contained in Article 6 of the Convention itself. Article 9(2) covers, in essence, projects which can have a significant environmental impact.

Article 9(3) provides for a general access to justice obligation, which the Convention refers to as “access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of [...] national law relating to the environment”.

Article 9(4), furthermore, requires contracting parties to provide adequate and effective remedies for violations of environmental law, including injunctive relief and to ensure that judicial review procedures be fair, equitable, timely and not prohibitively expensive.

With a view to aligning Member States’ legislation with Article 9(2) and (4) of the Convention, the EU has enacted Directive 2003/35/EC,⁷ which concerns public participation in relation to the authorisation of specific industrial activities affecting the environment.

With regard to access to justice provisions, this Directive has inserted Article 10a into the text of Directive 85/337/EC (the Environmental Impact Assessment (EIA) Directive)⁸ and Article 15a into the text of Directive 69/61/EC (the Integrated Pollution Prevention and Control (IPPC) Directive).⁹ Subsequently, these provisions have been transferred to the most recent versions of the EIA Directive and the IPPC Directives without any changes, and they are currently to be found

⁷ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2005] OJ L156/17.

⁸ Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40.

⁹ Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control [1996] OJ L257/26.

in Article 11 of Directive 2011/92/EU¹⁰ on the assessment of certain public and private projects on the environment and Article 25 of the recast Directive 2010/75/EU on industrial emissions.¹¹

Unlike Article 9(2), Article 9(3) of the Convention has not been transposed through secondary binding legislation. A legislative proposal was indeed tabled by the Commission in 2003,¹² but was never adopted and eventually withdrawn.¹³ Instead, the Commission has recently published a non-binding Communication where it tries to set minimum standards for national courts to apply the requirements of the Aarhus Convention.¹⁴

Having sketched the main provisions of the Aarhus Convention, this contribution will now turn to the examination of the relevant secondary EU law rules which have sought to transpose the Aarhus Convention and the case law in which they interacted with the principles of effectiveness and effective judicial protection, as well as Article 47 of the Charter.

3. The interaction between secondary rules, effectiveness and effective judicial protection in the case law of the Court of Justice relating to Article 9(2) and Article 9(4) of the Aarhus Convention: still in search of a coherent script?

3.1. Standing

As does Article 9(2) of the Convention, Directive 2003/35 provides two models of access to justice. While leaving Member States free to provide access to civil or administrative courts, the Directive requires them to

¹⁰ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1. Please note that the latest amendments to the EIA Directive brought by Directive 2014/52/EU did not touch Article 11. Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L124/1.

¹¹ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17.

¹² Commission, 'Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters' COM(2003) 624 final.

¹³ Withdrawal of obsolete Commission proposals [2014] OJ C153/3.

¹⁴ Commission, 'Commission Notice on Access to Justice in Environmental Matters' COM(2017) 2616 final. For a comment see J. Darpö, 'On the Bright Side (of the EU's Janus Face). The EU Commission's Notice on Access to Justice in Environmental Matters' [2017] *Journal for European Environmental & Planning Law* 373.

provide access to a review procedure wherein qualified members of ‘the public concerned’ can challenge ‘the substantive or procedural legality’ of decisions that are subject to the participation requirements mandated by the underlying Directives. However, the provisions leave the parties free to decide whether to allow standing for the ‘public concerned’ only where the claimant can maintain the impairment of a right or when it is able to show a ‘sufficient interest’.

Just like the Aarhus Convention, Directive 2003/25 does not directly define what is meant with the standing tests proposed: instead, Articles 10a and 15a state that what constitutes a sufficient interest and impairment of a right shall be determined by the Member States, subject, however, to two conditions. Firstly, ‘sufficient interest’ and ‘impairment of a right’ should be interpreted consistently with the objective of giving the public concerned wide access to justice. Secondly, any NGO promoting environmental interests and meeting any requirements under national law shall be deemed as capable of showing sufficient interest. Such organisations shall also be deemed to have rights capable of being impaired in a legal system that has opted for a rights-based approach.

This much-debated provision has come to the attention of the Court of Justice in a number of groundbreaking cases.

In the *Djurgården* case,¹⁵ the CJEU ruled that a requirement of Swedish law that an NGO had to have at least 2000 members to have access to court did not ensure a ‘wide access to justice’ and did not comply with the standards set by Directive 2003/35/EC. The answer in this case was submitted by the national court, and was answered by the Court of Justice, exclusively on the basis of the requirements of secondary law.

A few years after the *Djurgården* case, the CJEU decided on another preliminary reference in the *Trianel* case, this time sent by a German court and concerning the German transposition of Directive 2003/35/EC.¹⁶ According to the contested German provisions, non-governmental organisations promoting environmental protection were granted standing before a court, in an action contesting a decision authorising projects likely to have ‘significant effects on the

¹⁵ Case C-263/08 *Djurgården-Lilla Värtans Miljöskydds förening v Stockholms kommun genom dess marknämnd* EU:C:2009:631.

¹⁶ Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* EU:C:2011:289. See for a discussion of this case and other relevant cases examined in this paper, M. Eliantonio and F. Grashof, ‘Wir müssen reden! - We need to have a serious talk! The interaction between the infringement proceedings and the preliminary reference procedure in ensuring compliance with EU environmental standards: A case study of *Trianel*, *Altrip* and *Commission v Germany*’ [2016] *Journal for European Environmental & Planning Law* 325.

environment' for the purposes of Article 1(1) of the EIA Directive, only where they could show the potential infringement of a rule which confers individual rights. However, in the proceedings before the national court, the NGO was not maintaining the impairment of an individual right. Instead, it was seeking to challenge an administrative measure in so far as it authorised activities which, while not violating an individual's subjective rights, were likely to harm the environment as such. The question posed by the German judge was whether the German transposition of Directive 2003/35 could be considered to be in line with the requirement of 'wide access to justice' mandated by the Directive and the Aarhus Convention. The question of the national court was thus exclusively posed in terms of the compliance of national transposing law with EU secondary law. The answer of the Court of Justice in *Trianel* was instead based on *both* EU secondary law *and* the principle of effectiveness.

First, it held that whichever option a Member State chooses for the admissibility of an action (i.e. a right-based or an interest-based model), environmental protection organisations were entitled, pursuant to Article 10a of the EIA Directive, to have access to a review procedure before a court of law or another independent and impartial body established by law, to challenge the substantive or procedural legality of decisions, acts or omissions covered by that Article. This possibility had to be guaranteed, according to the Court, even where the rules relied on protected only the interests of the general public, and not the rights or interests of individuals. The German rules which prevented such challenges were therefore considered in breach of Article 10a.

The Court then seemed to move on to further test the German rules against the principle of equivalence and effectiveness. However, while it started reiterating the mantra of procedural autonomy, as qualified by equivalence and effectiveness, it did not *in practice* test the national measure against the principles. Instead it linked the German legislation back to Article 10a of Directive 2003/35/EC.¹⁷ It thus seems that the principle of effectiveness in this case was

¹⁷ Ibid, "43. Lastly, it should also be recalled that where, in the absence of EU rules governing the matter, it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, those detailed rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness). 44. Thus, although it is for the Member States to determine, when their legal system so requires and within the limits laid down in Article 10a of Directive 85/337, what rights can give rise, when infringed, to an action concerning the environment, they cannot, when making that determination, deprive environmental protection organisations which fulfil the conditions laid down in Article 1(2) of that directive of the opportunity of playing the role granted to them both by Directive 85/337 and by the Aarhus Convention."

used merely as a ‘cosmetic’ addition, but did not bring any added value either to the reasoning or to the end result reached by the Court.¹⁸

The Court referred to *Trianel* in a later case, which concerned the possibility for individuals to challenge a decision through which the competent Austrian authorities had decided that an EIA was not necessary. In *Gruber*,¹⁹ the Court reiterated the possibility to choose for a right-based or an interest-based model of standing, in accordance, however, “with the objective of giving the public concerned wide access to justice”. As in *Trianel*, the Court went on to discuss the question of procedural autonomy, equivalence, and effectiveness, but did not subsequently test the national provisions against the principles.²⁰

3.2. Costs of proceedings

Directive 2003/35, as does Article 9(4) of the Aarhus Convention, requires procedures not to be ‘prohibitively expensive’. This aspect is linked to the overall aim of the Aarhus Convention in that excessive costs of legal proceedings could effectively operate as a deterrent for members of the public and NGOs from seeking recourse through a judicial review mechanism.

This requirement has in turn been interpreted in some instances by the CJEU, which has sanctioned some Member States for failing to fully comply with the Directive.

In *Commission v Ireland* the Court had to rule on the implementation into Irish law of the obligation that procedures should not be prohibitively expensive.²¹ According to the Court the requirement does not prevent national courts from making cost orders addressed to unsuccessful litigants.²² However, a mere practice by courts aimed at reducing or at not imposing costs on litigants with insufficient means was not seen as sufficient implementation of the Public Participation Directive. In this case, the infringement procedure was merely based on Ireland’s failure to correctly transpose the Directive and the Court only based its conclusions on secondary law provisions.

¹⁸ See for a slightly different opinion Rob Widdershoven, who, albeit in cautious terms, argues that the *Trianel* case shows that “the principle of effectiveness might still have some impact, as it may strengthen the EU law prescribed procedural rules”. R. Widdershoven, ‘National Procedural Autonomy and General EU Law Limits’, in this special issue of *Review of European Administrative Law*, 5.

¹⁹ Case C-570/13 *Karoline Gruber v Unabhängiger Verwaltungssenat für Kärnten and others* EU:C:2015:231.

²⁰ *Ibid* [37].

²¹ C-427/07 *Commission of the European Communities v Ireland* EU:C:2009:457.

²² *Ibid* [92].

Furthermore, the CJEU addressed the costs regime of the United Kingdom in *Edwards*²³ and *Commission v UK*,²⁴ and it held that the discretionary practice of the UK courts to award protective cost orders contravened the requirements of the Public Participation Directive.

In *Edwards*, the CJEU specifically mentioned that a legal cost assessment by a national court should not be carried out solely on the basis of the financial situation of the person concerned, but must also be based on an objective analysis of the amount of the costs, particularly since members of the public and associations are naturally required to play an active role in defending the environment. Therefore, in the view of the Court, the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable.²⁵

In this case, the Court added an interesting point on the right to an effective remedy contained in the Charter and ‘*Rewe*-based’ the principle of effectiveness. Despite the fact that the infringement proceedings was based on the failure of the UK to correctly transpose Directive 2003/35 (and only the Directive is mentioned in the operative part of the ruling), the Court felt the need to add that

‘[m]oreover, the requirement that the cost should be “not prohibitively expensive” pertains, in environmental matters, to the observance of the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, and to the principle of effectiveness, in accordance with which detailed procedural rules governing actions for safeguarding an individual’s rights under European Union law must not make it in practice impossible or excessively difficult to exercise rights conferred by European Union law.’²⁶

It therefore seems that, in the line of reasoning of the court, the argument based on the right to an effective remedy and the principle of effectiveness was as such not necessary to reach its conclusion, but could contribute to strengthening it. Interestingly, this point was later taken up and given more emphasis

²³ Case C-260/11 *The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others* EU:C:2013:221.

²⁴ Case C-530/11 *European Commission v United Kingdom of Great Britain and Northern Ireland* EU:C:2014:67.

²⁵ Case C-260/11 *The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others* EU:C:2013:221, para 40.

²⁶ *Ibid* [33].

by the Commission Communication on Access to Justice which states that “a cost regime *has* therefore *to be shaped* in such a way as to guarantee that rights conferred by the EU can be effectively exercised”.²⁷ [emphasis added] It seems that the Commission is making of the Court’s statement reported above more than what the Court actually meant, by reading in the Court’s ruling an obligation which the Court itself only mentioned in passing.

In *Commission v UK*, the CJEU tackled the costs during interim proceedings and specifically the UK system of cross-undertaking in damages. The purpose of the latter is to ensure that the party subject to an interim injunction is compensated if the court subsequently decides against the party requesting the injunction and the other party has in the meantime suffered a loss as a consequence of complying with the injunction. The Court considered that this system was not sufficiently clear as to comply with the ‘not prohibitively expensive’ requirement, and did not further make any argument on the principles of effectiveness or effective judicial protection.²⁸

3.3. Scope of review

While not mandating a specific depth of review, Directive 2003/35 requires national procedural rules to allow courts to review the ‘substantive and procedural legality’ of decisions falling within the scope of application of Article 9(2) of the Convention. This requirement is rather vague and allows for quite some discretion on the part of the Member States.

However, it has also been given some flesh by the case law of the CJEU, which stated that, while Member States can limit access to court to challenge procedural defects which have no conceivable influence on the final administrative decision, they cannot put on the applicant the burden of proof that a procedural defect had an impact on the final decision.²⁹

The *Altrip* case is an interesting example of interaction between secondary procedural rules and the principle of effectiveness and effective judicial protection. The question posed by the referring court, as in the cases above, only concerned the compliance of the relevant German legislation with Directive 2003/35. However, the Court of Justice added to the reasoning also an argument based on the principle of effectiveness.

²⁷ Commission, ‘Commission Notice on Access to Justice in Environmental Matters’ COM(2017) 2616 final, para 177.

²⁸ Case C-530/11 *European Commission v United Kingdom of Great Britain and Northern Ireland* EU:C:2014:67, paras 70-72.

²⁹ Case C-72/12 *Gemeinde Altrip and Others v Land Rheinland-Pfalz* EU:C:2013:712.

In particular, the Court ‘inserted’ the argument concerning the principles ‘inside’ the margin of discretion left by the EU legislator by the relevant secondary rules. The Court indeed recognised that Member States are left with a margin of discretion to establish, according to their domestic systems, what a ‘right’ capable of giving access to court is. However, according to the Court, “the conditions fixed by the Member States for that purpose may not make it in practice impossible or excessively difficult to exercise the rights conferred by that directive”.³⁰ The Court, in the end, examined the German rules and concluded that they did not comply with the relevant EU secondary rules, but did not apply (at least explicitly) the test of effectiveness it outlined.

In a follow-up to the *Altrip* case, the Commission brought infringement proceedings against Germany and challenged the general national procedural provision requiring the impairment of a right to obtain the annulment of an administrative measure.³¹ The Court held that such a requirement does not violate EU law, but it did hold that a Member State cannot limit the scope of judicial review to the question of whether a decision not to carry out an environmental impact assessment was valid. The Court observed that excluding the applicability of judicial review in cases in which, having been carried out, an environmental impact assessment is found to be vitiated would render largely nugatory the provisions of Directive 2003/35. In this case, no mention of the principles of effectiveness and effective judicial protection is made.

3.4. Remedies

Finally, although the Aarhus Convention obliges the Contracting Parties to provide for adequate and effective remedies, this requirement cannot be found in Directive 2003/35. However, this requirement should still be considered as applicable in the EU legal order as, according to the case law of the CJEU, EU legislation implementing the Aarhus Convention must be interpreted in line with the latter.³²

The CJEU has partially intervened to fill this gap. By relying on earlier case law on this issue³³ it stated that, despite the absence of national procedural rules

³⁰ Ibid [46].

³¹ Case C-137/14 *European Commission v Federal Republic of Germany* EU:C:2015:683.

³² M. Eliantonio, ‘The Proceduralisation of EU Environmental Legislation: International Pressures, Some Victories and Some Way to Go’ [2015] *Review of European Administrative Law* 111.

³³ Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* EU:C:1990:257, para 21, and Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* EU:C:2007:163, para 67.

to this effect, national courts are able to avail themselves of interim measures to prevent environmental damage (a requirement which, although explicitly present in Article 9(4) of the Aarhus Convention, has also (inexplicably) not been incorporated in Directive 2003/35).³⁴

The *Križan* case is interesting because, as the *Altrip* case discussed above, it sheds light on how the Court of Justice seems to understand the relationship between secondary procedural rules and the principles of effectiveness and effective judicial protection in the field of environmental law. In particular, the Court argued that

By virtue of their procedural autonomy, the Member States have discretion in implementing Article 9 of the Aarhus Convention and Article 15a of Directive 96/61, subject to compliance with the principles of equivalence and effectiveness. It is for them, in particular, to determine, in so far as the abovementioned provisions are complied with, which court of law or which independent and impartial body established by law is to have jurisdiction in respect of the review procedure referred to in those provisions and what procedural rules are applicable.³⁵

It seems therefore that the Court understands the requirements of the Public Participation Directive as ‘minimum harmonisation’ and that therefore within those requirements the Member States are free to choose their own procedural rules, which remain still subject to the respect of the principles of equivalence and effectiveness.

3.5. Interim conclusions

The table below provides an overview of the case law discussed and the way in which the Court considered the relationship between the relevant secondary rules and the principles of effectiveness and effective judicial protection.

³⁴ Case C-416/10 *Jozef Križan and Others v Slovenská inšpekcia životného prostredia* EU:C:2013:8, paras 105-110.

³⁵ *Ibid* [106].

Procedural area	Case	Secondary law/effectiveness/effective judicial protection
Standing	<i>Djurgården</i>	Secondary law
	<i>Trianel</i>	Mentions effectiveness but doesn't use it
	<i>Gruber</i>	Mentions effectiveness but doesn't use it
Costs	<i>Commission v Ireland</i>	Secondary law
	<i>Edwards</i>	Mentions effectiveness and effective judicial protection (an additional argument)
	<i>Commission v UK</i>	Secondary law
Scope of review	<i>Altrip</i>	Effectiveness 'inside' the margin of discretion left by secondary law (but not used)
	<i>Commission v Germany</i>	Secondary law
Remedies	<i>Krizan</i>	Effectiveness 'inside' the margin of discretion left by secondary law (but not used)

It seems possible, on the basis of this overview, to conclude that no coherent and consistent approach can be distilled in the case law of the Court of Justice with respect to the requirements set in Article 9(2) of the Aarhus Convention and the transposing legislation. Perhaps unsurprisingly, much seems to depend on the way in which the 'claim' is phrased by the Commission in the infringement proceedings or the question is posed by the national courts in the preliminary questions. At the same time, this approach does not contribute to shed light on the interaction and relationship between procedural secondary law and the principles of effectiveness and effective judicial protection.

It is also interesting to note, however, that, in some instances, the Court has ventured beyond what was strictly required to give judgment in the case at stake and discussed the requirements of effectiveness (and, less often, those of effective judicial protection) as 'additional' limits to the margin of discretion afforded to the Member States when transposing secondary procedural rules which offer a certain room for manouver to domestic legislators. This development is one which should be highlighted because it goes to show that, even in the presence of EU procedural harmonization, when the field is not fully 'pre-empted' by EU legislation, national procedural rules still need to respect the requirements of effectiveness and effective judicial protection.

4. The non-transposition of Article 9(3) and the growing relevance of Article 47 of the Charter

4.1. The confusion in LZ I

As mentioned above, Article 9(3) of the Convention has not been transposed into binding secondary EU law. Because of this lack of transposition, a Slovakian court sent a preliminary question asking the Court of Justice to rule on whether the Convention provision could be considered as having direct effect before the national courts. While holding that Article 9(3) of the Aarhus Convention does not have direct effect, the Court did require national courts to interpret national law to the fullest extent possible in such a way as to provide access to non-governmental organisations alleging the violation of EU environmental law.³⁶

In the *LZ I* ruling, likely because of the lack secondary law in the matter, the Court gave a much clearer prominence to the principles of equivalence and effectiveness as a basis for the duty of consistent interpretation imposed on the national courts, than in any of the case law which was brought on the basis of the legislation transposing Article 9(2). However, the Court ‘swings’ in the reasoning between an ‘effectiveness’ language and one based on ‘effective judicial protection’. Having denied that Article 9(3) could contain obligations which are sufficiently clear and precise for the provision to have direct effect, the Court continued to state that:

‘... it must be observed that those provisions, although drafted in broad terms, are intended to ensure effective environmental protection.

47. In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in this case the Habitats Directive, since the Member States are responsible for ensuring that those rights are effectively protected in each case [...].

48. On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual’s rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law [...].

³⁶ Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* (‘*LZ I*’) EU:C:2011:125.

49. Therefore, if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.’

It can be observed that the Court starts from the perspective of “effective environmental protection”, moves to talk about “safeguarding rights which individuals derive from [...] the Habitats Directive” and individual’s rights under EU law, then returns to “effective protection of EU environmental law” and closes with “rights conferred by EU law”. The Court, therefore, blurs the distinction between the principle of effectiveness and that of effective judicial protection,³⁷ or at least ‘appends’ the effective protection of EU environmental law to the principle of effectiveness.

However, it is not clear which ‘rights’ are conferred by the Habitats Directive,³⁸ considering that this instrument has as main aim the protection of biodiversity and the Court also does not specify further how the provision which was allegedly violated by the Slovak authorities (and which concerned the possible derogations from the prohibition of hunting the brown bear) could be construed as conferring rights. This matter seems to be taken somewhat for granted in the Commission Communication of Access to Justice, where the Commission first states that “[T]he species protection provisions of this directive do not aim at protecting individuals but the environment, and this in the general interest of the public”.³⁹ Then, with an long-stretched interpretative jump, it concludes that “[T]herefore, the CJEU acknowledged that the claimant environmental NGO had a right that deserved judicial protection in the specific case, such as that of rendering the provisions of the Habitats Directive, 92/43/EEC, enforceable”.⁴⁰ Where the Commission reads this conclusion in the *LZ I* ruling is not clear, and no paragraph of the ruling is quoted.⁴¹

³⁷ On this point see S. Prechal and R. Widdershoven, ‘Redefining the Relationship between “Rewe-effectiveness” and Effective Judicial Protection’ [2011] *Review of European Administrative Law* 31.

³⁸ Council Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

³⁹ Commission, ‘Commission Notice on Access to Justice in Environmental Matters’ COM(2017) 2616 final, para 40.

⁴⁰ *Ibid.*

⁴¹ This latter point deserves some attention, especially in light of the fact the Communication as a whole contains a very dense body of references to specific paragraphs of the relevant case law.

While not directly tackling the relationship between secondary procedural rules and the principles of effectiveness and effective judicial protection (because of the lack of secondary rules taken in implementation of Article 9(3) of the Aarhus Convention), the *LZ I* ruling shows the first step towards a ‘language of rights’, which would subsequently be confirmed and applied also in an ‘Article 9(2) situation’ where secondary procedural rules do exist. The following section discusses this case law.

4.2. *LZ II* – taking the principle of effective judicial protection in environmental matters to the next level

The prominence of the principle of effective judicial protection is even more evident in the follow-up case of *LZ I*. In *LZ II*, the Court was asked to consider a provision of Slovakian law according to which it was not possible for a court to rule on the possibility for an NGO to participate in an administrative decision-making process after the judicial proceedings on the legality of the decision which closed the decision-making process have been definitively concluded.⁴² The referring court in particular questioned whether such a rule, which in the case at stake precluded the applicant NGO from pleading a violation of the Habitats Directive by the Slovak authorities, complied with Article 47 of the Charter.

The Court started with subsuming the legal problem under Article 9(2) of the Convention, since it took the view that the decision authorising the project in question, which is to be carried out on a site protected pursuant to the Habitats Directive as a special protection area or site of Community importance, was adopted in breach of the national authorities’ obligations under Article 6(3) of that Directive. According to the Court, this provision falls within the scope of Article 6(1)(b) of the Aarhus Convention (and triggers the applicability of Article 9(2) of the Convention), which mandates public participation requirements for projects which, while not being in the list of projects contained in Annex I of the Convention, nevertheless are considered as producing significant effects on the environment. According to the Court “the fact that the competent national authorities decided to initiate an authorisation procedure for that project pursuant to Article 6(3) of Directive 92/43 permits [...] the inference that those authorities considered it necessary to assess the significance of the project’s effect on the environment, within the meaning of Article 6(1)(b) of the Aarhus Convention”.⁴³

⁴² Case C-243/15 *Lesoochránárske zoskupenie VLK v Obvodný úrad Trenčín* EU:C:2016:838.

⁴³ *Ibid* [47].

The Court thus identifies the relevant right in the right to participate in environmental decision-making (as provided by Article 6 of the Aarhus Convention) and continues to speak the ‘language of rights’ (and of the Charter specifically) for the remainder of the ruling. In particular, the Court held that automatically dismissing an action against an administrative decision refusing the status of party to the administrative decision-making process as soon as the permit applied for is granted, does not enable an environmental NGO to be ensured effective judicial protection of the “rights inherent in the right of public participation”,⁴⁴ within the meaning of Article 6 of the Aarhus Convention. The Court’s insistence on the ‘language of rights’ is all the more striking if compared to the approach taken by the Advocate General, who instead assimilated the right an effective judicial protection (enshrined in Article 47 of the Charter) into the principle of effectiveness.⁴⁵

This ruling constitutes a big leap forward in the protection of environmental democracy and EU environmental law. First of all, because the Court expanded the reach of Article 9(2) of the Aarhus Convention to areas where no EU secondary legislation has been enacted on access to justice. As suggested by the Commission Communication on Access to Justice, “the rationale behind the CJEU’s interpretation lends itself to be applied by analogy to decision-making processes in other sectors of EU environmental law such as water and waste”.⁴⁶ Secondly, because, for the first time so clearly, the Court relied on the right to an effective remedy and Article 47 of the Charter in the context of the Aarhus Convention.

4.3. The grand finale: Protect

Another major breakthrough in the context of the increasing use of Article 47 of the Charter by the Court of Justice in environmental matters is represented by the case *Protect*.⁴⁷ The case concerned a permit to abstract water from a river for the purposes of producing snow for a ski resort. This was

⁴⁴ Ibid [68].

⁴⁵ Opinion of AG Kokott in Case C-243/15 *Lesoochránárske zoskupenie VLK v Obvodný úrad Trenčín* EU:C:2016:491, para 99, “the principle of effectiveness, in so far as this gives effect to Article 47 of the Charter”. See also L. Ankersmit, ‘Article 47 of the Charter precludes national procedural rules that allow decisions to be taken in environmental matters pending litigation on participation in that decision-making’ [2017] *European Journal of Risk Regulation* 448.

⁴⁶ Commission, ‘Commission Notice on Access to Justice in Environmental Matters’ COM(2017) 2616 final, 70.

⁴⁷ Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* EU:C:2017:987. For a discussion of this case and another case examined in this paper, see Ch. Sobotta, ‘New Cases on Article 9 of the Aarhus Convention: Court of Justice of the EU, Judgments of 20 December 2017, *Protect*, C-664/15, and of 15 March 2018, *North East Pylon Pressure Campaign and Sheehy*, C-470/16’ [2018] *Journal for European Environmental & Planning Law* 241.

a permit issued under the relevant Austrian legislation implementing the Water Framework Directive, hence outside the scope of the application of the Environmental Impact Assessment Directive and Article 9(2) of the Aarhus Convention. An NGO was denied status of party to the administrative decision-making proceedings leading to the granting of the permit and, consequently, on the basis of Austrian procedural law, it was denied standing to challenge the permit itself, which was ultimately granted by the competent national authorities.

The Court held that such a limitation is incompatible with Article 9(3) of the Aarhus Convention, read in combination with Article 47 of the Charter. In particular, the Court held that, while both the principle of national procedural autonomy and the margin of discretion afforded to Member States by Article 9(3) allowed domestic legislation to impose certain limitations to the standing of NGOs, “[I]mposing those criteria must not deprive environmental organisations in particular of the possibility of verifying that the rules of EU environmental law are being complied with, given also that such rules are usually in the public interest, rather than simply in the interests of certain individuals, and that the objective of those organisations is to defend the public interest”.⁴⁸ The opposite solution would deprive Article 9(3) of its effects, and “even its very substance”.⁴⁹

What is interesting is that, as in *LZ II*, the Court strived to read a ‘right’ into the situation brought before it. The ‘trick’ used in *LZ II*, namely to find a right in the right to participate in the decision-making process could not be used in this case, to the extent to which the Court did not consider the matter as falling within the scope of application of Article 9(2) of the Aarhus Convention. In this context, the reasoning of the Court again ‘swings’ between ‘the rights that an environmental organisation derives from Article 4 of Directive 2000/60’ (i.e. the Water Framework Directive)⁵⁰ and ‘the rights set out in Article 9(3) of the Aarhus Convention’.⁵¹ As in *LZ I*, the Court does not explain how the relevant provision of the Water Framework Directive, which concerns Member States’ obligations to take measures to prevent the deterioration of the status of all bodies of surface water, can be construed as conferring rights. In this context, it should be noted that, while the Advocate General, in the context of the discussion of whether Article 4 of the Water Framework Directive has direct effect,

⁴⁸ Ibid [47].

⁴⁹ Ibid [46].

⁵⁰ Ibid [44].

⁵¹ Ibid [45].

clearly stated that this provision cannot be construed as conferring rights,⁵² the Court of Justice instead did not touch upon this point. Instead, it quickly moves to state that the Charter and its Article 47 were applicable, and that Article 9(3) had to be read in the light of this latter provision.

This is a rather bold move on the part of the Court which certainly contributes to broaden NGO standing before national courts, even in lack of transposition of Article 9(3) and of direct effect of this provision.⁵³ This position also seems to confirm the trend of the Court of Justice, identified by others in this Special Issue, to ‘boost’ the applicability of the Charter by making it applicable also beyond clear situations in which a fundamental right is at stake.⁵⁴

A final word of caution should, however, be spent in order to not definitely herald *Protect* as a new dawn for Article 47 of the Charter in the context of environmental litigation. The most recent⁵⁵ of the cases on secondary procedural provisions in the environmental field casts indeed a – albeit small – shadow on the light irradiated by *Protect*. In the *Pylon* case, which was decided only three months after *Protect*, indeed, the Court took a much more conservative approach.⁵⁶ The case originated in a dispute about a powerline project in Ireland, in which the applicants alleged, amongst others, the violation of the Environmental Impact Assessment Directive. The Court of Justice was asked whether the applicants could rely on cost protection under the relevant provision EIA Directive or Article 9(4) of the Convention. In the ruling, the Court refrained from making an any argument based on the Charter and instead replicated the reasoning employed of *LZ I* and only mentioned (in the same intertwined and

⁵² Which, incidentally, according to the AG, did not prevent the provision from having direct effect. See Opinion of AG Sharpston in Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* EU:C:2017:760, para 59.

⁵³ As held first by the Court in the *LZ I* case, and repeated also in the *Protect* case. See also R. Widdershoven, ‘National Procedural Autonomy and General EU Law Limits’, in this special issue of Review of European Administrative Law, 5.

⁵⁴ See e.g. Case C-682/15 *Berlioz Investment Fund SA v Directeur de l’administration des contributions directes* EU:C:2017:373. On this point see further, M Bonelli, ‘Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature’, in this special issue of Review of European Administrative Law, 35.

⁵⁵ For the sake of completeness, it should be noted that actually the most recent of the cases on procedural secondary rules in the field of environmental law is Case C-167/17 *Volkmar Klohn v An Bord Pleanála* EU:C:2018:833. In this case, the question posed by the national court revolved, amongst others, around the direct effect of Article 9(4) of the Aarhus Convention. Here the Court only peripherally mentioned the principles of effectiveness and effective judicial protection (in the framework of a statement on the discretion left to Member States in transposing Directive 2003/35), but solved the case on the basis of the orthodox requirements for direct effect and consistent interpretation. The case does therefore not change any of the conclusions which arise from *Protect* and *Pylon*.

⁵⁶ Case C-470/16 *North East Pylon Pressure Campaign Limited and Maura Sheehy v An Bord Pleanála and Others* EU:C:2018:185.

somewhat opaque fashion) the effective protection of EU environmental law and the effectiveness of the protection of the rights stemming from EU law.⁵⁷

5. Conclusion

This contribution embarked upon the challenging task of trying to make sense of the case law of the Court of Justice which engaged with the procedural provisions stemming from the Aarhus Convention and its transposition in the EU legal system and their relationship with the principles of effectiveness and effective judicial protection, as well as Article 47 of the Charter of Fundamental Rights.

The analysis carried out with respect to the ‘older’ case law, dealing with the second paragraph of Article 9 and the transposing EU Directive, shows a somewhat incoherent and unpredictable approach on the part of the Court of Justice with respect to how it understands the relationship between procedural principles and secondary procedural rules. Much seems to depend on the specifics of the case (including how the questions are phrased in preliminary questions and how the arguments are built by the Commission in infringement proceedings), and little general guidance can be distilled. What seems to be the case is that, when the principle of effectiveness was recalled, it was not the decisive factor to lead the court to the final outcome. The principle of effective judicial protection is, in this strand of case law, next to non-existent.

The tide started to turn with *LZ I*, where, in the context of Article 9(3) of the Convention (which currently lacks transposition at the EU level), the Court starts speaking ‘the language of rights’ – albeit without a reference to the Charter. This reference comes instead prominently to the fore in *LZII*. In this case, the Court’s main argument to grant standing to the concerned NGO revolved around Article 47, which in the Court’s view had to be read in combination with the right to public participation enshrined in the Aarhus Convention. This trend was forcefully confirmed in *Protect*, in which again Article 47 was used as the main instrument to ensure the effectiveness of the Aarhus Convention. The *Protect* case seems also to confirm the expansive trend with respect to the use of Charter which the Court deems applicable also in the absence of a clear EU law-conferred right (possibly at the expense of the principle of effectiveness,

⁵⁷ “Therefore, if the effective protection of EU environmental law, in this case Directive 2011/92 and Regulation No 347/2013, is not to be undermined, it is inconceivable that Article 9(3) and (4) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law”. Ibid [56].

which seems no longer to be useful in assessing most national procedural rules).⁵⁸

Clearly, this development can constitute a powerful weapon in the hands of the Court to boost the effectiveness of the Aarhus Convention, especially in areas which are not covered by Article 9(2) of the Convention, since national procedural rules applicable in environmental litigation will need to comply with Article 47 of the Charter to be ‘Aarhus-proof.’ Time will tell whether this ‘testing phase’ in the use of Article 47, in the context of environmental litigation will turn into a steady position of the Court. One final – and unfortunately sombering – reflexion deserves to be made with respect to a possible reading of this very forthcoming case law in light of the rigid closure on the part of the Court, with respect to access to justice in environmental matters before the European Courts. In a long line of case law,⁵⁹ the Court has continued to apply the *Plaumann* requirements to environmental claims, to the effect that environmental NGOs are virtually barred from accessing the European courts in annulment actions.⁶⁰ This attitude escalated in the long and as of yet unresolved dispute before the Aarhus Convention Compliance Committee,⁶¹ which has ultimately declared the EU in breach of the access to justice provisions of Aarhus Convention for its too restrictive standing rules applicable before the European Courts. The ‘double standard’ applied by the Court of Justice to national procedural rules which are forcefully censored when they are deemed too restrictive, as compared to that applied to its own rules, which the Court has always deemed acceptable, cannot go unnoticed. In this light, the EU has always sought to defend itself against the attacks on its restrictive standing rules with the argument that direct actions at EU level ought be read in combination with the possibility of seizing national courts and in those national, indirectly accessing the Court of Justice through a preliminary question of validity under Article 267 TFEU.⁶²

⁵⁸ For the limited, yet continued importance of the principle of effectiveness, see R. Widdershoven, ‘National Procedural Autonomy and General EU Law Limits’, in this special issue of Review of European Administrative Law, 5.

⁵⁹ See e.g. Case T-91/07 *WWF-UK v Council* EU:T:2008:170 (confirmed in appeal in C-355/08 P); Case T-236/04 *EEB and Stichting Natuur en Milieu v Commission* EU:T:2005:426; Case T-37/04 *Região autónoma dos Açores v Council* EU:T:2008:236 (confirmed in appeal in C-444/08 P).

⁶⁰ See for a recent overview of these developments, M. van Wolferen and M. Eliañtonio, ‘Chapter 10. Access to Justice in Environmental Matters: The EU’s difficult road towards non-compliance with the Aarhus Convention’ in M. Peeters and M. Eliañtonio (eds), *Research Handbook of EU Environmental Law* (Edward Elgar, forthcoming).

⁶¹ Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) Concerning Compliance by the European Union, available at un-ecce.org/fileadmin/DAM/env/pp/compliance/C2008-32/Findings/C32_EU_Findings_as_adopted_advance_unedited_version.pdf accessed 14 October 2019.

⁶² See e.g. the official response to the Findings of the Aarhus Convention Compliance Committee: “the ACCC should acknowledge that, on the basis of settled case-law of the CJEU, within the jurisdictional system of the Union, national judges (as “*juge communautaire du droit commun*”) and courts play a central role for implementing Article 9(3) of the Aarhus Convention”. Com-

In this light, it is not unlikely that the bold move in *Protect* is yet another signal from the Court that recourse against environmental violations is, first and foremost, to be sought at the national level, because the systems of remedies is *allegedly* “complete”.⁶³

ments by the European Commission, on behalf of the European Union, to the draft findings and recommendations by the Aarhus Convention Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) concerning compliance by the European Union in connection with access by members of the public to review procedures, available at unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/From_Party/frPartyC32_18.10.2016_comments_draft_findings.pdf para 24, accessed 14 October 2019.

⁶³ The Court’s position is expressed in a steady line of case law, see e.g. Case C-583/11P *Inuit Tapiriit Kanatami a.o. v European Parliament and Council* EU:C:2013:625, paras 89 and ff.